

# Determining "Significance" Under NEPA

## Recent Court Decisions Highlight the Importance of "Context" and "Intensity"

### Introduction

The National Environmental Policy Act (NEPA) requires federal agencies to prepare an environmental impact statement (EIS) for any proposed action "significantly affecting the quality of the human environment." Because of this requirement, the word *significantly* is one of the key terms used in NEPA compliance. The presence of significant environmental effects triggers the requirement to prepare an EIS; the absence of significant environmental effects allows a federal agency to prepare a Finding of No Significant Impact (FONSI). To assist federal agencies in determining the appropriate level of analysis and the concomitant requisite documentation, an environmental assessment (EA) is typically prepared to determine the presence of significant effects.

Because the EIS is a more detailed document than a FONSI and requires a more extensive preparation process, federal agencies typically favor preparation of an EA to support a FONSI. According to the U.S. Environmental Protection Agency, federal agencies annually prepare more than 50,000 EAs leading to FONSI, contrasted with about 500 EISs. Despite this overwhelming trend in NEPA compliance, the conclusion of *no significant impact* is often not well supported by the accompanying EA.

According to the NEPA Regulations adopted by the President's Council on Environmental Quality (CEQ) (40 CFR 1500-1508), the term *significantly* is based on the twin criteria of *context* and *intensity* (40 CFR 1508.27).

### Defining Context and Intensity

*Context* means the affected environment in which a proposed action would occur; it can be

local, regional, national, or all three, depending upon the circumstances.

*Intensity* means the degree to which the proposed action would involve one or more of the following 10 factors:

- Adverse effects associated with "beneficial projects";
- effects on public health or safety;
- unique characteristics of the geographic area (e.g., historic resources, park lands, prime farmland, wetlands, wild and scenic rivers, ecologically critical areas);
- degree of controversy;
- degree of highly uncertain effects or unique or unknown risks;
- precedent-setting effects;
- cumulative effects;
- adverse effects on scientific, cultural, or historical resources;
- adverse effects on endangered or threatened species or designated critical habitat (pursuant to the Endangered Species Act); and
- violations of federal, state, or local environmental law.

### Recent Court Decisions

Unfortunately, neither those regulations nor most agency NEPA procedures provide adequate guidance about how to use the criteria in decision-making. The failure to document and discuss these criteria can leave a federal agency vulnerable to legal challenge. Three recent decisions in the 9th Circuit Court of Appeals illustrate what can happen if agencies misapply the context and intensity criteria.

***National Parks & Conservation Association v. Babbitt* (9th Cir. 2001) 241 F 3d. 722**

The National Park Service (NPS) was asked to increase the number of large cruise ships and other tour boats that would be allowed in Glacier Bay National Park, Alaska. To support its decision to allow such an increase, the NPS prepared a FONSI supported by an EA, in which it concluded that the increase would not “significantly affect the quality of the human environment.” The National Parks & Conservation Association disagreed and challenged the agency for failing to prepare an EIS.

The court began its decision by noting:

Glacier Bay National Park and Preserve is a place of unrivaled scenic and geological values associated with natural landscapes and wildlife species of inestimable value to the citizens. The Bay was proclaimed a national monument in 1925 and a national park in 1980. UNESCO designated Glacier Bay an international biosphere reserve in 1986 and a world heritage site in 1992.

Against this *context*, the court then considered three of the intensity criteria in the CEQ NEPA regulations: (1) the unique characteristics of the geographic area, (2) the degree to which the effects of the project were controversial, and (3) the degree to which the effects were uncertain.

In view of its opening remarks, the court had little problem concluding that the Glacier Bay environment represented the classic example of “unique characteristics,” the impacts on which would likely be significant. Because the unique characteristics were undisputed, the court then focused on the other two criteria.

With regard to *uncertainty*, the NPS admitted that for every issue discussed in the EA, environmental impacts would occur, but concluded that the degree of such impacts were “unknown” or “uncertain.” Additionally, by way of mitigation, the NPS committed to: (a) postapproval monitoring of the increased ship traffic; (b) postapproval ecological studies to

determine the extent of ecological impacts; and (c) development of additional postapproval management programs that could possibly reduce the impacts.

The court found that there was considerable *uncertainty* regarding both the possibility of impacts of increased ship traffic and the effectiveness of proposed mitigation measures to actually reduce the impacts. In evaluating the NPS’s efforts, the court concluded that the agency did not take NEPA’s requisite “hard look” at the environmental consequences prior to project approval. Further, the court noted that the lack of predecision environmental information was the very problem that NEPA (and EISs in particular) had been designed to address.

With regard to *controversy* the decision also held that the EA was deficient. In reaching this conclusion, the court focused both on the sheer volume of negative comments (citing “An outpouring of public protest”) and the fact that the majority of the comments related specifically to the uncertainty of the impacts.

***Anderson v. Evans* (9th Circuit 2002) 314 F 3d. 1006**

A Native American tribe proposed to resume whale hunting in a particular part of Puget Sound in the state of Washington. In approving the resumption of hunting, the National Oceanic and Atmospheric Administration (NOAA) prepared a FONSI supported by an EA in which it concluded that the hunt would not “significantly affect the quality of the human environment.” The lawsuit followed. In its decision, the 9th Circuit considered both the *context* of the proposal and several of the *intensity* factors.

With regard to *context*, the court held that a resource may be “locally significant” even if it is not significant from a regional or national perspective. Accordingly, the court concluded that the relatively small resident whale population in the Puget sound rendered the context significant.

With regard to *intensity*, the court found that the NOAA failed to correctly decide three of the ten *intensity* factors: *controversy*, *uncertainty*, and *precedent-setting effect*. The court found that the EA neither adequately addressed the three factors, nor was it supported by evidence on the record. Consequently, the court held that the resumption of whaling had the potential to “significantly affect the quality of the human environment” and accordingly ordered the preparation of an EIS.

***Public Citizen v. Department of Transportation*  
(9th Circuit 2003) 316 F 3d. 1002**

The U.S. Department of Transportation prepared a FONSI supported by an EA in connection with proposed regulations that would allow certain Mexican trucks to be driven in the U.S. under the North American Free Trade Agreement. The FONSI was challenged on the basis that the agency’s conclusion of nonsignificance of the impacts was improper under several of the *context* and *intensity* criteria in the CEQ NEPA regulations. The appellate court agreed.

With regard to *context*, the court held that the agency used the wrong context when it compared future truck emissions to a national emissions inventory rather than to the local air pollution situation in the border communities where the impacts would occur. According to the court, this use of the wrong context resulted in the agency understating the significance of the air quality impacts. The fact that most border communities were already in violation of air quality standards was an important factor in the court’s reasoning.

With regard to *intensity*, the court found that the agency had misused four of the 10 criteria found in the CEQ NEPA regulations. First, it failed to consider the adverse public health aspects of the new regulations. Second, the agency overlooked the high level of uncertainty regarding future levels of truck traffic and the resultant emissions. According to the court, the uncertainty itself was a trigger for a finding of significance. Third, the agency failed to consider that the increased truck emissions would likely

violate both the California and federal Clean Air Acts. Finally, the court found that the overwhelming outpouring of public protest (90% of comments in opposition) was a trigger for the *controversy* criterion of significance.

## How to Avoid Problems

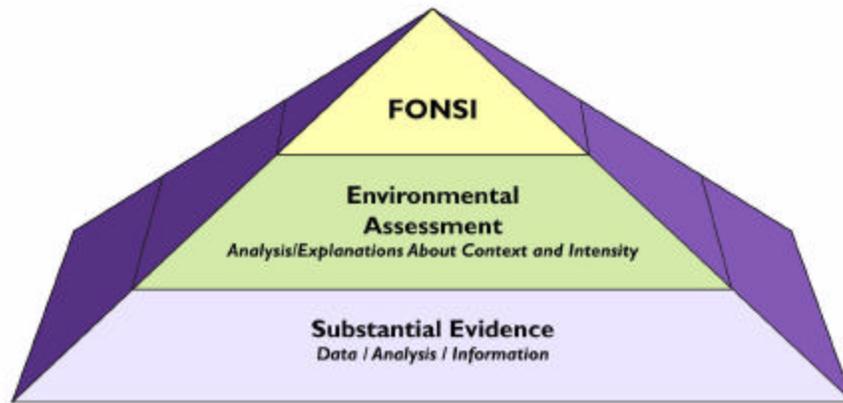
As emphasized by the foregoing decisions, when a federal agency intends to rely on a FONSI for NEPA compliance, it must convincingly demonstrate - with either hard data, certain and definitive mitigation measures, or both - that the impacts of the proposed action would not be significant. This is best done by a systematic and careful evaluation of the context and intensity criteria, with the necessary factual documentation to support its conclusions of nonsignificance.

One way of ensuring that context and intensity get proper consideration is to develop an EA worksheet or checklist that explicitly incorporates the context and intensity factors. This worksheet should include a discussion of context and all relevant intensity factors for each resource of the human environment potentially affected by the federal action.

Further, to support a FONSI, an agency’s EA must include an explanation, supported by substantial evidence, for each of the context and intensity factors. If an agency intends to use the EA to support a FONSI there must be substantial evidence to support the conclusion that all the impacts would not be significant (see figure, Page 4). If, on the other hand, substantial questions remain unanswered about the significance of environmental impacts, the agency should prepare an EIS.

The above cases suggest that, at least in some instances, federal agencies may attempt to predetermine that an EIS will not be necessary and then use the EA to rationalize that conclusion-whether or not the evidence supports it. To avoid such problems, federal agencies should stop using EAs as surrogates for EISs. Rather, the EA should be used as intended by the CEQ regulations: as a tool to determine the whether to prepare an EIS or a FONSI.

## Determining Significance with the FONSI Pyramid



To support a FONSI, a lead agency must document and explain in the EA that the impacts of a proposed action would not be significant. Accordingly, the analysis in the EA must include a discussion of the applicable context and intensity factors for each resource that would be affected by the proposed action. It should explain why the combination of context and intensity would result in significant or nonsignificant impacts.

The conclusions regarding significance in the EA must, in turn, be based on substantial evidence that consists of data, analysis, and information. This relationship may be schematically represented by a pyramid, in which the FONSI is supported by the EA, which is in turn supported by the substantial evidence.

The more solid the pyramid that the lead agency builds, the better that agency's chances of withstanding challenges to its decision to rely on a FONSI.

**NOTE:** In the April 2003 *Environmental Update* regarding recently voided CEQA Guidelines sections, it was noted that Section 15152 (f)(3)(c) was voided, but the text was not struck out in the update. Please note that this section

was, indeed, voided by the California Court of Appeal in its *Communities for a Better Environment v. California Resources Agency* (2002) [103 Cal.App.4th 98] decision.

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